Supreme Court of the United States.

October Term, 1918.

THE UNITED STATES,
Appellant,
v.
CONRAD S. BABCOCK. } No. 708.

MOTION TO AFFIRM OR PLACE ON SUMMARY DOCKET.

Now comes the appellee, Conrad S. Babcock, by his attorneys and moves the court that the judgment in this cause be affirmed on the ground that the questions on which the decision of the cause depends are so frivolous as not to need further argument; or else that the cause be placed on the summary docket.

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BRIEF IN SUPPORT OF MOTION TO AFFIRM.

I. STATEMENT OF THE CASE.

FINDINGS AND JUDGMENT.

This is the claim of an officer of the United States Army for the value of a horse lost in the military service in July, 1910.

The Court of Claims found the loss of the horse as follows (rec. p. 4, Finding III):

"The Government furnished as the forage ration barley with the awns on it and the horse died of strangulation of the intestines from eating such forage at said place. The loss was without fault or negligence on the part of the plaintiff."

The word "awns" used in this finding is defined in the Century Dictionary as "a bristle-shaped terminal or dorsal appendage, such as the beard of wheat, barley and many grasses."

The Secretary of War has decided that the horse in question was reasonable, useful, necessary and proper for the officer to have had in his possession while engaged in the public service in the line of duty.

The court found the horse to be worth $200, and gave judgment in favor of the claimant for that amount (Finding VI, rec. p. 4; judgment, p. 5). From this judgment the United States appealed April 23, 1918, which appeal was allowed by the court October 21, 1918 (rec. p. 5).

STATUTES.

Revised Statutes of the United States, Sec. 3482:

"Any field, or staff, or other officer, mounted militiaman, volunteer, ranger, or cavalryman, engaged in the military service of the United States, who sustains damage without any fault or negligence on his part, while in the service, by the loss of a horse in battle, or by the loss of a horse wounded in battle, which dies of the wound, or which, being so wounded, is abandoned by order of his officer and lost, or who sustains damage by the loss of any horse by death or abandonment because of the unavoidable dangers of the sea when on board a United States transport vessel, or because

the United States fails to supply transportation for the horse, and the owner is compelled by the order of his commanding officer to embark and leave him, or in consequence of the United States failing to supply sufficient forage, or because the rider is dismounted and separated from his horse and ordered to do duty on foot at a station detached from his horse or when the officer in the immediate command orders the horse turned out to graze in the woods, prairies, or commons, because the United States fails to supply sufficient forage, and the loss is consequent thereon, or for the loss of necessary equipage, in consequence of the loss of his horse, shall be allowed and paid the value thereof, not to exceed $200." * * *

Act of June 22, 1874 (18 Stat. 193):

"An Act to Amend an act entitled 'An Act to provide for the payment of horses and other property lost or destroyed in the military service of the United States,' approved March 3, 1849.

"*Be it enacted*, etc., That the first section of the act of March 3, 1849, providing for the payment for horses and equipments lost by officers or enlisted men in the military service shall not be construed to deny payment to such officers or enlisted men for horses which may have been purchased by them in States in insurrection; and payment in any case shall not be refused where the loss resulted from any exigency or necessity of the military service, unless it was caused by the fault or negligence of such officers or enlisted men.

"Sec. 2. That no claims under said section or this amendment thereto shall be considered unless presented prior to the first day of January, 1876."

Act of March 3, 1885 (23 Stat. 350):

"An act to provide for the settlement of the claims of officers and enlisted men of the Army for loss of private property destroyed in the military service of the United States.

"*Be it enacted*, etc., That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which have been, or may hereafter be, lost or destroyed in the military service, under the following circumstances:

"First. When such loss or destruction was without fault or negligence on the part of the claimant.

"Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment.

"Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated, and shall be in full for all such loss or damage: *Provided*, That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered: *And provided further*, That this act shall not apply to losses sustained in time of war or hostilities with Indians: *And provided further*, That the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion shall decide to be reasonable, useful, necessary and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: *And provided further*, That all claims now existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction."

II. BRIEF OF ARGUMENT.

The allowance of this claim in the court below was urged in the alternative, either under Revised Statutes, Section 3482, and its supplementary enactment of June 22, 1874; or under the act of March 3, 1885.

We will briefly submit alternative grounds of recovery under one or the other of these acts.

I. REV. STAT. SEC. 3482, AND ACT OF 1874.

Section 3482 of the Revised Statutes is a reenactment of the first section of an act approved March 3, 1849 (9 Stat. 414).

The loss of this horse is within the literal terms of Revised Statutes, sec. 3482, because the loss "was in consequence of the United States failing to supply sufficient forage." Forage of a character so injurious as to cause a fatal intestinal disease was certainly not "sufficient" in the sense of being proper or healthful food for animals. The language of the statute means sufficient good forage. The supplying of bad forage is just as much within this statute as not supplying forage at all. It can not be said that the horse had sufficient forage, when all the forage that was supplied was unfit for consumption. Grain unfit for food is not forage; it is poison.

See definition of "sufficient" in many adjudicated cases cited in "Words and Phrases," one of which is as follows:

"'Sufficient,' as defined by Webster, means adequate to suffice; equal to the end proposed; competent. *Pensacola & A. Ry. Co.* v. *State*, 5 South. 833, 835; 25 Fla. 310; 3 L. R. A. 661."

Still more clearly is this claim valid under the

amendatory act of 1874. That act was thus construed by the Court of Claims not long after its enactment, *Thomas* v. *United States* (16 C. Cls. 522, 525):

"In our opinion the meaning of this section is to give the act of 1874 the effect of amending section 3482 of the Revised Statutes, so as practically to do away with the specifications therein contained of cases in which compensation for the loss of a horse by an enlisted man may be allowed and paid, and to authorize such allowance and payment 'in *any* case where the loss resulted from *any* exigency or necessity of the military service.'"

It will hardly be denied that this case is within Revised Statutes, Sec. 3482, or its amendment of 1874.

It may, however, be contended that it is barred by the second section of the act of 1874, as not having been presented prior to the 1st day of January, 1876.

The section in question was considered by the Court of Claims in 1904, together with a separate statute of limitations enacted January 9, 1883 (22 Stat. 401). These acts were held to operate merely as statutes of limitation concerning claims in existence at the date of their passage; not as acts repealing the long-standing policy to pay for horses lost in the military service, beginning in 1796. *Hardie* v. *United States*, 39 C. Cls. 250, reaffirmed in *Cox* v. *United States*, 41 C. Cls. 86.

In the *Cox* case the horse was lost in 1898, in the *Hardie* case in 1900. The Court of Claims awarded judgments, holding that the claims were within Revised Statutes, Sec. 3482, and its amendment of June 22, 1874, and were not barred either by the second section of that act or by the limitation placed upon the presentation of claims by the act of January 9, 1883 (22 Stat. 401).

The decisions in the *Hardie* and *Cox* cases consti-

tuted the law of the Court of Claims in this class of cases for a period of twelve years. Judgments without opinions were rendered by the Court of Claims in a large number of cases extending from 1903 to 1915. These are reported in the Court of Claims reports as follows:

Francis Hunter Hardie, 38 C. Cls. 754; *George Van Horn Moseley*, 40 C. Cls. 531; *Frank W. Gruetzmacher*, 40 C. Cls. 538; *John L. Sellers, Charles B. Ewing, Charles A. Tayman, Charles E. Woodruff, William H. Bisbee*, 40 C. Cls. 548 (there erroneously listed as claims for "extra pay" but shown to be "horse lost in the military service" by official reports of "Judgments Rendered by the Court of Claims," House Document 307, 59th Congress, 1st Session, p. 2); *Gordon Johnston*, 41 C. Cls. 513; *John King Freeman, Frederick S. Young*, 41 C. Cls. 519; *Lewis S. Ryan*, 41 C. Cls. 524 (correct nature of claim shown in House Doc. 307, 59th Cong. 1st Sess. p. 2); *George K. Hunter*, 41 C. Cls. 530 (correct nature of claim shown House Doc. 859, 59th Cong. 1st Sess. p. 2); *Palmer E. Pierce*, 41 C. Cls. 531 (correct nature of claim shown House Doc. No. 859, 59th Cong. 1st Sess. p. 2); *William S. Valentine*, 41 C. Cls. 532 (correct nature of claim shown House Doc. 859, 59th Cong. 1st Sess. p. 3); *Benjamin B. Hyer, James H. McRae, Winfield S. Edgerly, Frank R. Lang, Robert E. L. Spence, William R. Molinard, Alonzo B. Coit, Frank E. Lyman, Jr., Harry H. Pattison, Carl L. Mueller, George T. Langhorne, Henry Carroll*, 41 C. Cls. 538, 539, 540 (correct nature of claims shown Senate Doc. 511, 59th Cong. 1st Sess. p. 5); *Edwin L. Martindale*, 41 C. Cls. 544 (correct nature shown House Doc. 656, 59th Cong. 2d Sess. p. 8); *Frank R. McCoy, Hugh L. Scott*, 41 C. Cls. 543 (correct nature shown

House Doc. 656, 59th Cong. 2d Sess. p. 8); *William D. Beach*, 42 C. Cls. 539; *Thomas P. Williams, Edmund L. Butts, Benjamin W. Atkinson, Henry L. Ripley, David M. Dodge, George F. Buss, George C. Geer, Harry W. Krumm, Tyree R. Rivers*, 42 C. Cls. 555 (correct nature of claims stated Senate Doc. 369, 59th Cong. 2d Sess. p. 6); *George H. Priest*, 42 C. Cls. 557 (Senate Doc. 369, 59th Cong. 2d Sess. p. 8, shows correct nature of claim); *Herbert H. Sargent*, 42 C. Cls. 563 (correct nature of claim shown House Doc. 345, 60th Cong. 1st Sess. p. 2); *William T. Littebrant*, 43 C. Cls. 601 (correct nature of claim shown Senate Doc. 498, 60th Cong. 1st Sess. p. 2); *George H. Morgan*, 44 C. Cls. 615 (correct nature of claim shown House Doc. 437, 61st Cong. 2d Sess. p. 2); *William W. West, Jr.* 47 C. Cls. 661; *James E. Abbott*, 48 C. Cls. 520; *Samuel W. Fountain, Robert S. Woodson*, 49 C. Cls. 697; *Milton G. Holliday*, 49 C. Cls. 701; *Alfred C. Markley*, 49 C. Cls. 710; *Alexander H. Davidson*, 49 C. Cls. 714; *James W. Clendenin, Mathias Crowley, Walter S. Duggan, William R. Eastman, William M. Wright*, 50 C. Cls. 410; *Charles D. McMurdo*, 50 C. Cls. 412; *William R. Pope, Robert R. Love*, 50 C. Cls. 413; *Philip F. Harvey*, 50 C. Cls. 418. (The subject matter of some of the above claims is erroneously stated in the Court of Claims Reports, but in all such cases the description is corrected by a reference to the official report of the Secretary of the Treasury to Congress for appropriation, which description designates each of these cases as being for horse lost in the military service; the reference to the Congressional Document is given in each such case.)

As we have shown, this view as to the continued existence and force of Revised Statutes, Sec. 3482, and its amendment of 1874 was adopted by the Court

of Claims in 1904, reaffirmed in 1906, and applied up to 1915, judgments being given in sixty cases. Such a long continued judicial construction should be conclusive, especially when it is considered that every one of the judgments rendered was appealable to this court. Revised Statutes, Sec. 707, reenacted Judicial Code, Sec. 242, provides that all judgments against the United States irrespective of the amount may be carried by the United States on appeal to this court. (*United States* v. *Gleeson*, 124 U. S. 255; *Reid* v. *United States*, 211 U. S. 529; *Fritch Co.* v. *United States*, present term not yet reported.) Such a long acquiescence by the government in a ruling as to the continued force of Revised Statutes, Sec. 3482, and the act of 1874 is conclusive.

As late as 1914 the Court of Claims held that horses lost by officers in the military service were not covered by the act of March 3, 1885, governing payment for property lost in the military service of the United States for the very reason that they were within the provisions of Revised Statutes, Sec. 3482, and its amendment of 1874 providing payment for horses and equipment lost by officers in the service of the United States, *Sibley* v. *United States*, 49 C. Cls. 242, 249, 250.

Change of Ruling.

In 1916 and 1917 a series of cases involving losses of horses by Army officers in the service of the United States came before the Court of Claims and are all reported in Vol. 52 of the reports of that court.

These are *Griffis* v. *United States*, 52 C. Cls. 1; same case on motion for new trial at p. 170; and *Andrews* v. *United States*, p. 373, with which are reported others, including this one of *Babcock* at p. 385.

Each one of these opinions is by a different judge. The ruling of each opinion may be summarized as follows:

Griffis, 52 C. Cls. 1: *Holds* that Revised Statutes, Sec. 3482 and its amendment of 1874 are repealed by the expiration of the limitation of time contained in legislation of 1874, 1883 and 1888, there considered. Previous decisions of the court in the *Hardie* and *Cox* cases (39 C. Cls. 250 and 41 C. Cls. 86) are specifically considered and overruled. All the judgments rendered during the previous twelve years on the strength of these cases are held to be erroneous.

Griffis, 52 C. Cls. 170: *Holds* that while the limitation contained in the acts of 1874, 1883 and 1888 repealed the amendatory act of 1874, "section 3482 of the Revised Statutes continued in force unaffected by the act of 1874." It was also specifically decided that the act of 1885 (quoted at the opening of this brief, *ante*, pp. 3, 4) "did not apply to claims for losses of horses" (52 C. Cls. one-third down p. 198, referring to *Sibley's* case, 49 C. Cls. 242).

Andrews, 52 C. Cls. 373: *Holds*, that the act of March 3, 1885 (quoted, *ante*, pp. 3, 4,), is the law now governing claims for the losses of horses in the service and that the present claimant, Conrad S. Babcock, is entitled to recover thereunder (52 C. Cls. 385, 386).

II. ACT OF MARCH 3, 1885.

We have been insisting that this claim is allowable under Section 3482 of the Revised Statutes, which would amply justify recovery with or without the amendatory act of 1874. If, however, those acts are not in force or are not regarded as applying to this class of cases then this case is clearly within the lost

property act of 1885 (*ante*, pp. 3, 4). That act clearly includes a horse as an article of property which an officer is required to have in the military service.

The court (*Andrews* v. *United States*, 52 C. Cls. 380) states the reasons for so holding in an eminently satisfactory manner:

"The language employed in the first paragraph of the act of 1885 is decidedly comprehensive. From it alone it is not difficult to perceive a legislative intent to reimburse officers and enlisted men in the military service for the loss of *private property* lost or destroyed, under the circumstances mentioned, in said service. Obviously, it was designed to cover in toto the private property carried by the persons enumerated into the military service which was indispensable to the peculiar conditions of that particular governmental service; in other words, 'reasonable, useful, necessary, and proper for such officer or soldier while in quarters.' If we are to exclude privately owned horses from the term 'private property,' a reason must be found outside the express language of the act, for it can not be discovered within its terms if we give to the words used their ordinary, usual, and well-known significance."

The earlier decision in *Sibley* v. *United States*, 49 C. Cls. 242, refused allowance under this act only on the ground that the loss of horses was otherwise provided for by Sec. 3482 of the Revised Statutes and the amendment of 1874, *ante*, pp. 2, 3. If those acts did not apply to horses in time of peace, as held by the Court of Claims, then no possible reason exists for excluding horses from the purview of the act of 1885. The act of 1885, *ante*, pp. 3, 4, limits the liability of the government to such articles of personal property as the Secretary of War in his discretion shall decide to be "reasonable, useful, necessary and proper" for the officer under the circumstances. The Secretary has made such a de-

cision in this case (Finding V, Rec. p. 4), although it may be unnecessary in a proceeding in the Court of Claims or anywhere in relation to a horse which every cavalry officer is required by Army Regulations to keep (Army Regulations, 1913, paragraph 1272).

The direction of the act of 1885 "That the proper accounting officers of the Treasury" shall settle the claims does not divest the Court of Claims of jurisdiction (*Medbury* v. *United States*, 173 U. S. 492; *McLean* v. *United States*, 226 U. S. 374, 378).

STARE DECISIS.

The case before the court involves the rule of *stare decisis*. The construction given in two well considered decisions and followed in sixty cases for a period of twelve years should not be set aside and an entirely new construction adopted.

This is not a case of continued importance as a matter of administration. Congress by new legislation, enacted as a part of the Army appropriation act of July 9, 1918, Chapter VI, 40 Stat. 880, 881, has made new and different provisions for the future, retroactive to the beginning of the present war, and indefinitely prospective in regard to the loss of private property. It provides that the act of March 3, 1885 (quoted, *ante*, pp. 3, 4), shall be amended to read as follows:

"Sec. 1. That private property belonging to officers, enlisted men, and members of the Nurse Corps (female) of the Army, including all prescribed articles of equipment and clothing which they are required by law or regulations to own and use in the performance of their duties, and horses and equipment required by law or regulations to be provided by mounted officers, which since the 5th day of April, 1917, has been or shall hereafter be lost, damaged, or destroyed in the military

service shall be replaced, or the damage thereto or its value recouped to the owner as hereinafter provided, when such loss, damage, or destruction has occurred or shall hereafter occur in any of the following circumstances:"

Here follow detailed provisions as to circumstances of loss, time and manner of presenting claims, etc.

New and different provisions are thus made for the future. Distinct provision is made to reimburse officers for "horses and equipment required by law or regulations to be provided by mounted officers." The statutes which up to 1916 were construed by the Court of Claims as providing for the loss of horses in the military service of the United States should not receive a different construction as to the few cases remaining before the taking effect of the new legislation of 1918.

The judgment, whether regarded as under Revised Statutes, Sec. 3482, and its amendment of 1874, or under the act of March 3, 1885, was correct and should be affirmed.

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